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**Building Laborers' Union, Local 310 and Safway Services, LLC and Indiana, Kentucky, Ohio Regional Council of Carpenters, Party-in-Interest.**  
Case 08–CD–153099

October 29, 2015

**DECISION AND DETERMINATION OF DISPUTE**

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND MCFERRAN

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Employer Safway Services, LLC (Safway or the Employer) filed a charge on May 28, 2015,<sup>1</sup> alleging that Building Laborers' Union, Local 310 (Laborers) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Laborers rather than to employees represented by Indiana, Kentucky, Ohio Regional Council of Carpenters (Carpenters). A hearing was held on August 14 before Hearing Officer Laural S. Wagner.<sup>2</sup> No party filed posthearing briefs.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, we make the following findings.

**I. JURISDICTION**

The Employer and Laborers stipulated that the Employer is a Delaware limited liability corporation, with a location and place of business at 5251 West 130th Street, Cleveland, Ohio, where it sells, rents, erects, and dismantles scaffolding and associated products. During the 12 months preceding the filing of the charge, the Employer purchased and received at its Cleveland, Ohio facility goods valued in excess of \$50,000 directly from points outside of the State of Ohio. The Employer and Laborers further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers and Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

<sup>1</sup> All dates are in 2015, unless otherwise indicated.

<sup>2</sup> Representatives for Safway and Laborers appeared at the hearing. Carpenters did not enter an appearance.

**II. THE DISPUTE**

**A. Background and Facts of the Dispute**

The Employer is a subcontractor engaged in the business of scaffold erection and dismantling on jobsites in northeast Ohio and also the rental and sales of scaffold equipment. The Employer employs approximately 25 employees represented by Laborers. The Employer and Laborers have had a collective-bargaining relationship since Laborers was certified in 1966. The current agreement is in effect from May 1, 2010, through April 30, 2016.<sup>3</sup> The contract states that "the provisions of this Agreement shall be binding upon both parties on Scaffolding Construction work in Cuyahoga, Geauga and Lake Counties, Ohio." The Employer is also party to the Northeast Ohio Carpenters' Agreement 2013–2018 (Carpenters' Agreement), but no additional details concerning this agreement were presented at the hearing. Representatives of the Employer testified that it has had a long-held practice of assigning the work of erecting and dismantling scaffolding to employees represented by Laborers.

The Employer erected scaffolding at a project at Cleveland State University's CIHP building in Cleveland, Ohio. The Employer then left the jobsite while other trades used the scaffolding to complete their work on the project. The Employer assigned the work of erecting and dismantling the scaffolding at the site to employees represented by Laborers. The work dispute in this case arose when Laborers-represented employees were dismantling the scaffolding. The job steward for Laborers informed the Laborers' business agent that the Carpenters showed up at the jobsite, claiming the scaffold dismantling work.

On or about April 27, 2015, Carpenters' business representative, William A. Karkoff II, sent a grievance letter to the Employer, stating that it was violating the terms of the Carpenters' Agreement, as well as the 16 Point Jurisdictional Agreement of February 14, 2008, by using employees represented by Laborers to perform the scaffold erection and dismantling work at the CIHP building. The grievance letter requested that the Employer pay the contractual wages and fringe benefits lost to unit employees. The letter further announced that Carpenters was submitting the grievance to the Joint Arbitration Board. The associate counsel for the Employer, Teresa Mueller, sent the Carpenters a letter in response, stating that the Employer was not a party to the 16 Point Jurisdictional Agreement. Mueller further noted that the dispute was not subject to arbitration under the Carpenters' Agree-

<sup>3</sup> The contract in evidence, which states that it is effective from May 1, 2010, through April 30, 2015, has an automatic renewal provision.

ment, but rather was a jurisdictional dispute between Carpenters and Laborers stemming from a demand for the same work. The Employer's branch manager, Mark Sawka, testified that the Employer was not a party to the 16 Point Jurisdictional Agreement.

On May 4, 2015, Laborers' Business Manager Terrence Joyce sent a letter to Sawka, noting that, since 1966, the Laborers had exclusively represented the Employer's scaffold erectors/dismantlers in Cuyahoga, Lake, and Geauga Counties. The letter stated that Laborers would picket the Employer if it reassigned the scaffold work at the CIHP building to Carpenters-represented employees. Mueller sent Carpenters a followup letter, addressing Laborers' threat to picket, and further emphasizing that the work of erecting and dismantling the scaffolding has historically been performed by Laborers-represented employees. There has been no picketing at the jobsite.

#### B. Work in Dispute

As clarified and stipulated by the parties at the hearing, the work in dispute is "certain scaffold erection/dismantling work performed by Safway Services, LLC at Cleveland State University's CIHP in Cleveland, OH."

#### C. Contentions of the Parties

The Employer and Laborers contend that there are competing claims for the work in dispute, that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated by Laborers' threat to picket if the work in dispute was reassigned to employees represented by Carpenters, and that the parties have not agreed on a method for voluntary adjustment of the dispute. The Employer and Laborers further contend that the work in dispute should be awarded to employees represented by Laborers based on the factors of Board certification and collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills and training, and economy and efficiency of operations. As previously stated, Carpenters did not appear at the hearing or file a posthearing brief. Accordingly, the evidence and contentions of the Employer and Laborers stand uncontradicted.

#### D. Applicability of the Statute

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). This standard requires finding that there is reasonable cause to believe that there are competing claims for the disputed work between rival groups of employees, and that a party has used pro-

scribed means to enforce its claim to that work. Additionally, there must be a finding that the parties have not agreed on a method of voluntary adjustment of the dispute. *Id.* On this record, we find that this standard has been met.

#### 1. Competing claims for work

We find reasonable cause to believe that both Unions have claimed the work in dispute for the employees they respectively represent. Laborers has claimed the work by its May 4 letter to the Employer objecting to the possible reassignment of the work in dispute to Carpenters-represented employees. Furthermore, pursuant to well-established authority, the performance of this work by Laborers-represented employees evidences a claim to the work at issue. See *Sheet Metal Workers Local 54 (Goodyear Tire & Rubber Co.)*, 203 NLRB 74, 76 (1973); *Operating Engineers Local 513 (Thomas Industrial Coatings)*, 345 NLRB 990, 992 fn. 6 (2005) (same) (citing *Laborers Local 79 (DNA Contracting)*, 338 NLRB 997, 998 fn. 6 (2003) (same)).

We also find that Carpenters has claimed the disputed work by virtue of its April 27 pay-in-lieu grievance alleging that Safway violated the Carpenters' Agreement by using employees represented by Laborers to perform the work in dispute. The Board has long found that such pay-in-lieu grievances are essentially demands for disputed work. See, e.g., *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57, slip op. at 3 (2010), and *Laborers (Eshbach Bros., LP)*, 344 NLRB 201, 202 (2005).

#### 2. Use of proscribed means

Laborers admits, and we find, that there is reasonable cause to believe that Laborers used proscribed means to enforce its claims to the work in dispute. As noted above, Laborers sent a letter to the Employer's branch manager, Sawka, stating that Laborers would picket the Employer if it reassigned the scaffolding work in dispute to employees represented by Carpenters. The Board has long considered this type of threat to be a proscribed means of enforcing claims to disputed work. *Operating Engineers Local 150 (Patten Industries)*, 348 NLRB 672, 674 (2006).

#### 3. No voluntary method for adjustment of dispute

The Employer and Laborers agree that there is no voluntary adjustment procedure in place among the parties to resolve the current work dispute. Carpenters did not so stipulate but proffered no evidence or argument to the contrary.

Based on the foregoing, we find that there are competing claims for the work in dispute, reasonable cause to believe that Section 8(b)(4)(D) has been violated, and no

agreed-upon method for the voluntary adjustment of the dispute. We accordingly find that the dispute is properly before the Board for determination.

#### *E. Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577–579 (1961). The Board has held that its determination in a jurisdictional dispute is “an act of judgment based on common sense and experience,” reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of dispute.

##### 1. Certifications and collective-bargaining agreements

The Employer and Laborers stipulated that, in assigning the work in dispute, the Employer is not failing to conform to an order or Board certification.<sup>4</sup>

As stated above, the Employer’s collective-bargaining agreement with Laborers provides that “the provisions of this Agreement shall be binding upon both parties on Scaffolding Construction work in Cuyahoga, Geauga and Lake Counties, Ohio.” The collective-bargaining agreement clearly covers the work in dispute.

As also stated above, the grievance letter from Carpenters indicates that the Employer is bound by the terms of the Carpenters’ Agreement as well as the 16 Point Jurisdictional Agreement of February 14, 2008. The Employer acknowledged that it is a party to the former agreement, but denied being a party to the latter one. No evidence concerning either agreement was presented at the hearing. Because there was no evidence establishing that the Carpenters’ Agreement covers the work in dispute, we find that this factor favors an award of the work in dispute to employees represented by Laborers.

##### 2. Employer preference and past practice

The Employer’s representatives testified that the Employer currently has assigned the disputed work to employees represented by Laborers, and it prefers that this work remain with them. In addition, the Employer’s representatives testified that assignment of the disputed work to Laborers-represented employees is consistent with its past practice. Specifically, Sawka and the Employer’s general foreman, Richard Gilette, testified that,

in the time they have worked for the Employer, it has always assigned the scaffold erection and dismantling work within Cuyahoga, Lake, and Geauga Counties to employees represented by Laborers. The Employer’s representatives further testified that the only time that the Employer assigned this work to employees represented by Carpenters was when the job was outside of this geographic area. Thus, we find that this factor favors awarding the disputed work to employees represented by Laborers.

##### 3. Area and industry practice

The Employer presented evidence that there are four specialty scaffolding contractors in the northeast Ohio area who collectively perform most of the scaffolding work. Each of these companies, including the Employer, uses employees represented by Laborers exclusively to perform scaffold erection and dismantling work in Cuyahoga, Lake, and Geauga Counties. In this regard, Sawka and Gilette testified that companies with which the Employer competes for work, including Dependable Scaffolding, Scaffco, and B & K Scaffold, always used Laborers-represented employees to perform scaffold erection and dismantling work in this geographic area. They further testified that none of the Employer’s competitors assigned this work to employees represented by Carpenters. In addition, Laborers provided declarations from each of the Employer’s three competitors that support this area practice. Accordingly, we find that this factor favors an award of the work in dispute to employees represented by Laborers.

##### 4. Relative skills and training

The Employer presented testimony that employees represented by Laborers possess the requisite skills and training to perform the disputed work and that they are experienced in doing so. Specifically, Sawka testified that the Employer provided extensive scaffold training and safety training. Sawka further testified that Laborers are experts in scaffolding because “all they do is build scaffold,” observing that “. . . they’re the best trained, [and] very reliable.”

In contrast, the record does not include evidence on whether employees represented by Carpenters have received relevant training or possess the skills to perform the work in dispute. Sawka testified that the Employer has not had positive experiences when it used Carpenters for scaffold erecting and dismantling outside of Cuyahoga, Lake, and Geauga Counties. Specifically, he explained that employees represented by Carpenters were unqualified, unprepared, and unreliable. Gilette testified that employees represented by Carpenters were not experienced in scaffold erection and dismantling because they

<sup>4</sup> The current collective-bargaining agreement between the Employer and Laborers states that, on April 22, 1966, in Case 08–RC–006228, the Board certified Laborers as the exclusive representative of employees covered by the agreement.

generally perform different work. Accordingly, we find that this factor favors an assignment of the work to employees represented by Laborers.

#### 5. Economy and efficiency of operations

The Employer presented testimony that it is more efficient for the Employer to assign the disputed work to employees represented by Laborers. Sawka testified that employees represented by Laborers do “the most efficient work,” because their expertise is in the erection and dismantling of scaffolds. The evidence shows that on the rare occasion when the Employer has assigned scaffolding work to Carpenters-represented employees outside of Laborers’ geographic area, it has been expensive and inefficient because they do not have the necessary knowledge or experience. Accordingly, we find that this factor favors an award of the disputed work to employees represented by Laborers.

#### Conclusion

After considering all of the relevant factors, we conclude that employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion based on the factors of Board certification and collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills and training, and economy and efficiency of operations. In making this determination, we award the work to em-

ployees represented by Laborers, not to that labor organization or to its members.

#### DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Safway Services, LLC, who are represented by Building Laborers’ Union, Local 310, are entitled to perform certain scaffold erection/dismantling work performed by Safway Services, LLC at Cleveland State University’s CIHP building in Cleveland, Ohio.

Dated, Washington, D.C. October 29, 2015

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD